No. 16-1466

In The Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* CROWN BUILDING MAINTENANCE CO. & CROWN ENERGY SERVICES, INC. *d/b/a* ABLE SERVICES AND NORTHERN INDIANA INDEPENDENT CONTRACTORS GROUP IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* CROWN BUILDING MAINTENANCE CO. & CROWN ENERGY SERVICES, INC. *d/b/a* ABLE SERVICES AND NORTHERN INDIANA INDEPENDENT CONTRACTORS GROUP IN SUPPORT OF RESPONDENTS

Amici curiae Crown Building Maintenance Co. & Crown Energy Services, Inc. *d/b/a* Able Services and Northern Indiana Independent Contractors Group respectfully submit this brief as *amici curiae* in support of Respondent, with the written consent of the Parties.[1]

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are private employers and employer associations who routinely negotiate collective bargaining agreements with private-sector unions. In states where it is permissible to do so (*i.e.*, non-"right-to-work" states), *amici*'s contracts typically include union security clauses. Although these private-sector union security clauses are not directly implicated by this case, *amici* are nevertheless well-positioned to explain to this Court why union security clauses benefit both employers and employees by promoting harmony and stability in the workplace – and how the absence of such clauses creates potential for employee

[1] The parties have filed blanket consent letters with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no counsel or party, or any person other than *amici*, their members, and counsel, made a monetary contribution intended to fund the brief's preparation or submission.

resentment and strife that undermines productivity, profitability, and labor-management relations more generally. *Amici*'s perspective is valuable to this Court as a counter-weight to Petitioner's intimation that union security clauses only serve the interests of the bargaining entity – the union – and not employers or employees. *See, e.g.*, Brief for Pet., p. 17.

Amici also are well-positioned to explain to this Court why employers and employees benefit alike when all parties in collective bargaining are free to negotiate over a wide range of terms, including union security clauses. In *amici*'s experience from negotiating agreements in both "right-to-work" and non-"right-to-work" states, removing the option to include such a clause in a collective bargaining agreement undermines employers' ability to negotiate for terms they most prefer.

Amicus Able Services ("Able") is a national employer operating in 25 states and the District of Columbia. Able provides engineering, janitorial and facility services to commercial office buildings, residential high-rises, hotels and hospitals. Nationwide, Able employs over 10,000 people. Its workforce consists of engineers whose duties encompass ensuring the operation of buildings' heating and cooling systems (among other internal systems) by operating, maintaining, troubleshooting and making repairs when needed. Able's workforce also consists of workers who perform building maintenance or janitorial services as well as other facility services.

Able estimates that roughly 85 percent of its workforce is represented by unions and thus covered by collective bargaining agreements. Able is currently a signatory to approximately 120 collective bargaining agreements nationally. An overwhelming majority of these collective bargaining agreements are patterned after a "Master Labor Agreement" ("MLA") with the Building Owner and Management Association. The MLA and most of the other collective bargaining agreements contain a union security clause which requires covered employees to become and remain members of the signatory union, or if they choose not to be actual members, then to pay their fair share of representation fees, as a condition of employment. Able previously filed an *amicus* brief in the Ninth Circuit in *International Union of Operating Engineers Local 370 v. Wasden*, Case No. 16-35963 (9th Cir.), a case challenging Idaho's private sector "right-to-work" law on federal statutory and constitutional grounds.

Amicus Northern Indiana Independent Contractors Group ("NIICG") is an unincorporated association of over 100 construction industry employers located in fourteen counties in northern Indiana. Since the spring of 2011, the NIICG has bargained on behalf of its employer members with Local 150 of the International Union of Operating Engineers, AFL-CIO. The union represents approximately 3,000 heavy equipment operators and other construction workers in the northern Indiana area. The "Master Agreement" negotiated with Local 150 in 2011 contained a union security clause which required employees to become and

remain members of the union, or pay their fair share of representation fees, as a condition of their employment. That union security clause was invalidated after Indiana passed its right-to-work law. *See* I.C. §§ 12-6-6-9, 12-6-6-13. NIICG previously filed an *amicus* brief in the Seventh Circuit in *IUOE Local 139 et al. v. Schimel*, Case Nos. 16-3736 & 16-3834 (7th Cir.), a case challenging Wisconsin's private sector right-to-work law on federal statutory and constitutional grounds.

SUMMARY OF ARGUMENT

Although they are private employers, *amici* support the Respondents' view that union security clauses are an important element of workplace harmony and labor-management relations. As *amici* know from their own experience, union security clauses are commonplace in the private sector. And for good reason: as this Court and Congress have repeatedly recognized, union security clauses promote labor peace by prohibiting "free riding" by employees who wish to benefit from the union-negotiated wages, benefits, and protections, but do not wish to contribute toward the cost of those bargaining and representational activities.

By making sure each employee pays his or her way, union security clauses serve many larger purposes. They decrease the inevitable resentment and tension that occurs when as many as two-thirds (or more) of employees in "right-to-work" states opt out of paying their fair share, thereby causing their fellow

workers to pay more. Union security clauses necessarily enhance cooperation and collaboration in the workplace, which numerous studies have shown brings a host of benefits, including increased productivity, better customer service, and even higher profits.

Moreover, union security clauses are an important part of collective bargaining process. As employers, *amici* know that collective bargaining is most effective when all parties are free to negotiate for the provisions they most value. Without the ability to negotiate for union security clauses that bargaining units value, employers have comparatively less ability to obtain the types of contract provisions they most desire. Thus, the ability to bargain freely over any provision – including union security clauses – ultimately enhances both employers' and employees' interest.

Simply put, Petitioner and *amici* are wrong to suggest that union security clauses should be seen as evidence of improper political influence of public sector unions over elected officials. On the contrary, these clauses make perfect sense for the employers who willingly agree to them. This Court should decline Petitioner's invitation to upset decades of labor jurisprudence by overruling *Abood v. Detroit Board of Education*, 431 U.S. 224 (1977).

ARGUMENT

I. Employers Regularly Agree to Include Union Security Clauses in Collective Bargaining Agreements, Even in the Private Sector.

Petitioner's argument rests in part on the mistaken premise that union security clauses are best seen as proof of improper political influence in the negotiation of a collective bargaining agreement between a public employer and a public employees' union. *See, e.g.*, Brief for Pet., p. 17. *Amici*, as private employers, know the opposite is true: rational employers often choose to adopt such clauses for a range of valid purposes.

As this Court is aware, union security clauses are expressly authorized by numerous federal laws, including Section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3), and Section 2, Eleventh, of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Eleventh. These clauses allow employers to require "that employees pay the fees and dues necessary to support the union's activities as the employees' exclusive bargaining representative," including expenses "germane to collective bargaining, grievance adjustment, or contract administration." *Marquez v. Screen Actors Guild, Inc.*, 119 S. Ct. 292, 296 (1998) (citing *Communications Workers of America v. Beck*, 487 U.S. 735, 762-63 (1988)). And this Court has repeatedly considered – and, with certain caveats not relevant here, upheld – the validity of such clauses against myriad challenges in a variety of contexts, including: public-sector unions, *see, e.g.*, *Lehnert v. Ferris Faculty Ass'n*,

500 U.S. 507 (1991), and *Abood*, 431 U.S. 224; private-sector unions, *see, e.g.*, *Marquez*, 525 U.S. at 36, *Beck*, 487 U.S. at 762-763, and *NLRB v. General Motors Corp.*, 373 U.S. 734, 744 (1963); and railroad unions, *see Brotherhood of Ry. & S. S. Clerks, Freight Handlers, Exp. & Station Emp. v. Allen*, 373 U.S. 113 (1963), *International Association of Machinists v. Street*, 367 U.S. 740, 745 (1961), and *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956). As this Court explained in *Beck*, Congress has "authorized compulsory unionism" in both the NLRA and RLA "to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost." *Beck*, 487 U.S. at 746.

As these cases illustrate, union security clauses are indeed commonplace in the private sector. *Amicus* Able is currently a signatory to approximately 120 collective bargaining agreements nationally. An overwhelming majority of these collective bargaining agreements are patterned after a "Master Labor Agreement" ("MLA") with the Building Owner and Management Association. These collective bargaining agreements cover union-represented employees on a building-by-building basis. The MLA and most of the other collective bargaining agreements contain a union security clause which requires covered employees to become and remain members of the signatory union, or if they choose not to be actual members then to pay their fair share of representation fees, as a condition of employment.

Likewise, and as noted above *amicus* NIICG regularly negotiates with Local 150 on behalf of numerous

employers. The resulting contracts often contain union security clauses like the one that had been invalidated by Indiana's right-to-work law. In fact, *amicus* understands that Local 150 has *no* collective bargaining agreements without union security clauses in any non-right-to-work state.

Amici's willingness to repeatedly agree to such clauses reflects the positive experience they have had with unionized workplaces in which all employees pay their fair share for representation services provided by the union. For example, through its collective bargaining relationship, the union provides Able with a stable source of the best-trained and skilled employees, which brings expertise and professionalism to the company's workforce. This efficiency inures to the benefit of customers, tenants, patients, the public at large, and ultimately to Able's success as a company.

The record in the aforementioned litigation challenging Idaho's right-to-work law (in which Able filed an *amicus* brief) illustrates that *amici* are not alone in their willingness to agree to such clauses. There, a union representative explained that the union "has been able to obtain a union security clause in every one of its Collective Bargaining Agreements" in states without right-to-work laws. *International Union of Operating Engineers Local 370 v. Wasden*, 217 F. Supp. 3d 1209, 1216 (D. Idaho 2016), *appeal pending*, No. 16-35963 (9th Cir.); *see also id.* at 1217 (noting the union's "perfect track record of obtaining service fee agreements in states without [right-to-work] laws" (internal quotation marks and citations omitted)). (As noted

above, the same is true for Local 150, the union that *amicus* NIICG bargains with.)

The parties' willingness to adopt union security clauses in these private-sector agreements has nothing to do with the political influence of public employee unions. Rather, and as explained below, it has everything to do with the employees', employers', and unions' recognition that union security clauses enhance stability and create harmony in the workplace.

II. Union Security Clauses Promote Stability and Reduce Strife in the Workplace, Which Enhances Employee Productivity, Customer Service, and Even Employer Profits.

Petitioner wrongly suggests that there is no conceivable governmental interest that could justify a union security clause like the one at issue here. *See, e.g.*, Brief for Pet., pp. 23, 37-38. That argument is wrong, as this Court's precedents have repeatedly recognized. As with all other employers, union security clauses serve "the government's *vital* policy interest in labor peace and avoiding 'free riders.'" *Lehnert*, 500 U.S. at 519 (emphasis added); *see also Abood*, 431 U.S. at 232 ("'[T]he union security issue in the public sector . . . is fundamentally the same issue . . . as in the private sector. . . . No special dimension results from the fact that a union represents public rather than private employees.'" (quoting H. Wellington & R. Winter, Jr., *The Unions and the Cities* 95-96 (1971)).

Congress, too, has long been concerned about the presence of such "free riders" in the unfettered marketplace – a problem common to both public- and private-sector workplaces. Indeed, and as this Court explained at length in *Communications Workers of America v. Beck*, the very same Congress that enacted a ban on "closed shop" agreements – which prohibited an employer from hiring an employee unless they already were part of a union – expressed great concern that "without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts." 487 U.S. at 748 & n. 5 (collecting relevant legislative history).

To solve this problem in the private-sector union context, Congress enacted the Taft-Hartley Act of 1947. The Act "was 'intended to accomplish twin purposes.'" *Id.* (quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-741 (1963) (quoting S. Rep. No. 80-105, p. 6). "On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop." *Id.* At the same time, "Congress recognized that in the absence of a union-security provision many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." *Id.* (internal quotation marks and citation omitted). Indeed, this Court observed that there was "considerable evidence adduced at congressional hearings indicating that 'such agreements promoted stability by eliminating "free riders."'" *Id.* at 755-756 (citing S. Rep. No. 80-105, p. 7).

The changes brought by the Taft-Hartley Act "were intended only to 'remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating "free riders" the right to continue such arrangements.'" *General Motors Corp.*, 373 U.S. at 741 (quoting S. Rep. No. 80-105, p. 6, 1 Leg. Hist. L.M.R.A. 412). "As far as the federal law was concerned, all employees could be required to pay their way." *Id.*; *see also Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976) ("Congress' decision to allow union-security agreements at all reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them.").

Just four years after the Taft-Hartley Act, Congress adopted a virtually identical provision in the Railway Labor Act. *See* 45 U.S.C. § 152, Eleventh. This Court upheld that provision against constitutional challenge on the ground that Congress's commerce powers plainly permitted it to conclude that union security clauses promoted "industrial peace and stabilized labor-management relations." *Hanson*, 351 U.S. at 234.[2]

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[2] Less than a decade later, Congress again amended the NLRA, this time to allow for agreements that require mandatory union membership in certain circumstances. Congress enacted Section 8(e) of the NLRA, which generally bars "hot cargo" agreements that prohibit employers and unions from entering into agreement where the employer "ceases or refrains . . . from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business

In *amici*'s experience, Congress's conclusion that union security clauses promote "industrial peace and stabilized labor-management relations," *Hanson*, 351 U.S. at 234, is exactly right. As noted above, *amici* are parties to dozens of collective bargaining agreements in both right-to-work and non-right-to-work states. *Amici*'s experience shows that right-to-work laws banning union security clauses like the one at issue here have the potential to damage their business operations by sowing disharmony in their workforces and allowing free riders to enjoy the benefits and securities provided by labor agreements without paying their fair share for such representation. That, in turn, creates internal resentment and conflict that further undermines unions' relations with management. It also threatens the foreseeable and disastrous effect of labor strikes and, more broadly, industrial strife at large. Therefore, by eliminating the potential for free riding through appropriate union security clauses where permissible, *amici* have found a reduction in the inevitable strife caused by allowing some of its unionized employees to escape their financial responsibilities to contribute to the cost of union representation.

The potential for strife and resentment is not a hypothetical concern. To see why, this Court need look no

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with any other person," 29 U.S.C. § 158(e), but nevertheless authorized collective bargaining agreements in the construction industry that "bar subcontracting except to subcontractors who are signatories to agreements with particular unions." *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 648 (1982). This Court upheld those agreements – which constitute even stronger medicine than the union security clauses at issue in this case.

further than the record in the Idaho right-to-work case discussed above. There, the union was required by federal law to "represent all workers in a bargaining unit, even those who are not Union members." *Wasden*, 217 F. Supp. 3d at 1211. The same thing is true, of course, in the case of public sector unions like the ones at issue here: "In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others." *Lehnert*, 500 U.S. at 556 (Scalia, J., dissenting).

And although that "representational work benefits all bargaining unit employees," because of the operation of Idaho's right-to-work law, the union's representational work "is paid for entirely by those workers who choose to be Union members." *Wasden*, 217 F. Supp. 3d at 1211. In the Idaho case, that was only 32 percent of the relevant bargaining unit, each of whom contributed approximately 2.5 times their hourly wage each month to belong to the union, and thereby support the other 68 percent of employees in that unit who "pay nothing" for the services they receive. *Id.* The union had proposed a security clause that would have required non-members of the union to pay their fair share of the representational expenses, but was rebuffed by the employer because of the state's right-to-work law.

Petitioner does not dispute that, as in the Idaho case, as many as two-thirds of all employees might choose to "free ride" if public sector unions were not allowed to have union security clauses in their contracts.

On the contrary, Petitioner points to similar union membership levels in states like Nevada, Iowa, Florida, and Nebraska as proof that unions can be successful where governing law allows for exclusive representation but forbids union security clauses. *See* Brief for Pet., p. 41 n. 20. Given that concession, it is illogical to suggest that free riding is not a serious problem, or a grave threat to workplace cohesion, when a small fraction of employees have to pay additional fees to support the mandatory collective bargaining and grievance activities for the rest of the employees. Indeed, such membership levels pose a real threat to the very existence of the union.

Contrary to Petitioner's suggestion that free riding does not really harm anyone (*see, e.g.*, Brief for Pet., pp. 52-53), it *is* a serious problem for employers like *amici*. *Amici*'s businesses are complex undertakings that cannot succeed without close cooperation among multiple classifications of workers – in Able's case, those who provide the day-to-day engineering and maintenance operations of large office buildings, residential high-rises, hotels and hospitals. Resentment between union members paying full dues and free riders enjoying the same wages and benefits but paying nothing undercuts the goal of cooperation. This resentment inevitably poses the risk of mushrooming into conflicts counter to the interests of building or property owners, commercial or residential tenants, the individuals whom they service, and ultimately the public at large. Petitioner's suggestion that free riding

does not really harm the unions themselves – an assertion *amici* dispute – is therefore not the full story.

Petitioner's myopic focus on whether free-riding harms unions ignores a problem that is all too real for *amici* and other employers: workplace resentment and discord caused by free riding imposes significant opportunity costs for employers in the form of lost productivity, cohesiveness, and even profit. A growing body of social science research has consistently found that the impact of high-quality communication and relationships among employees – described in the literature as "relational coordination" – leads to better performance outcomes including more efficiency, quality, safety, client engagement, employee well-being, and learning/innovation.[3] And – importantly from *amici*'s

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[3] *See, e.g.*, J.H. Gittell, A. von Nordenflycht, & T.A. Kochan, *Mutual gains or zero sum? Labor relations and firm performance in the airline industry*, Industrial and Labor Relations Review, 57(2), 163-179 (2004) (relational coordination in airline sector was associated with staff productivity and faster turnaround time of aircraft); H.W. Lee, *Relational coordination of workforce diversity and firm performance: The moderating effects of workgroup autonomy and multisource feedback*, Masters Thesis, University of Seoul (2014) (finding increased productivity in study of manufacturing firms with higher relational coordination among employees); K. Bozan, *The perceived level of collaborative work environment's effect on creative group problem solving in a virtual and distributed team environment*, Proceedings of the 50th Hawaii International Conference on System Sciences (2017) (relational coordination between employees predicted staff perceptions of a collaborative work environment and creative problem solving among information systems professionals).

perspective – these gains also translate into higher firm-level profits.[4]

Simply put, this Court was right to hold, repeatedly, that "considerations that justify the union shop in the private context – the desirability of labor peace and eliminating 'free riders' – are equally important in the public-sector workplace." *Lehnert*, 500 U.S. at 518; *see also generally Abood*, 431 U.S. 224 ("The desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller."). As *amici* have learned from operating in both right-to-work and non-right-to-work states, the benefits of union security clauses are indeed real.

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[4] *See, e.g.*, J.H. Gittell, D. Weinberg, A. Bennett, & J.A. Miller, *Is the doctor in? A relational approach to job design and the coordination of work*, Human Resource Management, 47(4), 729-755 (2008) (relational coordination between employees is associated with lower patient costs in healthcare settings); H. Alvarez, *The role of relational coordination in collaborative knowledge creation*, Ph.D. Dissertation, Maastricht University (2014) (relational coordination led to improved cost performance in the pharmacy sector); H.W. Lee, *supra* (relational coordination led to higher net profits and firm competitiveness in manufacturing); M. Siddique, *Exploring the linkages between high performance work systems and organizational performance: The role of relational coordination in the banking sector of Pakistan*, Ph.D. Dissertation, Newcastle University School of Business (2014) (relational coordination in banking sector led to growth in deposits, advances, and profitability).

III. Employers, Employees, and Unions All Benefit from Robust Bargaining with Maximum Freedom to Contract.

The animating principle behind federal labor law is that employers should be free to negotiate with employees' chosen representatives to strike the bargain that best achieves each side's goals. As this Court has long observed in the context of private collective bargaining negotiations, Congress "was generally not concerned with the substantive terms on which the parties contracted"; it simply "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *NLRB v. Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485-86, 488 (1960); *see also Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74 (1991) (same).

Congress' relatively hands-off approach to the substance of collective bargaining arose out of a recognition "that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth – or even with what might be thought to be the ideal of one." *Insurance Agents*, 361 U.S. at 488. Rather, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Id.* at 489.

For this reason, Congress and the courts have at times allowed employers and unions to negotiate clauses that balance the goal of labor stability with employee free choice. To take just one example, Congress has recognized that one of the most effective ways to curb industrial strife was to ensure management and labor are free to negotiate contract provisions such as "no strike clauses." *See Textile Workers' Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 454 (1957). In exchange for "assurance of uninterrupted operation" via a no-strike clause, the union obtained a grievance arbitration procedure, an essential component espoused by the National Labor Policy. *Id.*; 29 U.S.C. § 171(b). Although such clauses restrict employee freedom, this Court and the Courts of Appeals have nevertheless upheld them as valid means to promote employers' interests in labor stability. *See Building and Construction Trades v. Associated Builders and Contractors of Massachusetts (Boston Harbor)*, 507 U.S. 218, 221 (1993); *Colfax Corporation v. Illinois State Toll Highway Authority*, 79 F.3d 631, 635 (7th Cir. 1996); *Trans. Intl. Airlines, Inc. v. International Brotherhood of Teamsters*, 650 F.2d 949, 961 (9th Cir. 1980).

Likewise, Courts have approved the NLRB's "Contract-Bar" Doctrine, under which "a collective bargaining agreement protects an existing bargaining relationship from challenge for the contract term." *NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d 678, 683 (7th Cir. 1994). "The Board will generally refuse decertification elections, whether requested by the employer, the employees or another union, for the life of

the bargaining contract." *Id.* (citing *Westwood Import Co. v. NLRB*, 681 F.2d 664, 666 (9th Cir. 1982)). The rule also prohibits "employers from repudiating the contract or withdrawing recognition of a union for the contract term." *Id.* (citing *NLRB v. Marine Optical, Inc.*, 671 F.2d 11, 16 (1st Cir. 1982)). Again, this rule restricts employee freedom by generally preventing new elections during the term of an existing contract, but has been affirmed because of its propensity to promote labor stability.

In light of these longstanding, background principles of labor law, there is nothing particularly unusual about union security clauses' propensity to prioritize industrial peace over individual choice. Indeed, that is the very reason why Congress permitted such clauses under the Taft-Hartley Act and Railway Labor Act, in order to ensure that all employees pay their fair share.

In *amici*'s experience, state right-to-work laws singling out union security clauses as uniquely impermissible subjects for negotiation interfere with the freedom of employers to engage in unfettered collective bargaining and to determine for themselves after meeting and conferring with the employees' chosen collective bargaining representative whether the adoption of union security clauses is in the employers' best interests. Such laws therefore elevate the rights of employees who refuse to support unions over those rights held by their union co-workers and employers to voluntarily enter into an agreement which equitably spreads the cost of representation among all those employees who benefit from it. And, crucially, *amici* have

found that the inability to negotiate over such clauses removes an important arrow from its own quiver, making it harder to negotiate for other provisions it would like to obtain in the contract, but the union might otherwise resist.

History is full of such examples. During World War II, for example, efforts to jump-start the defense industry were hampered by a series of crippling strikes affecting locomotive production and airplane assembly plants. *See* Nelson Lichtenstein, Nelson, *Labor's War at Home: The CIO and World War II*, Cambridge University Press 67-82 (1982). The Roosevelt administration responded by creating the National War Labor Board ("NWLB") to arbitrate labor disputes and establish contract terms designed to eliminate strikes and moderate excessive wage demands. The NWLB, consisting of representative of labor, management and the public, secured no-strike pledges from unions and instituted a policy known as the "Little Steel Formula," which was first applied in the steel industry and later adopted more broadly. In return for a no-strike pledge and wage controls, the NWLB instituted "maintenance of membership" clauses. *Id.* at 79. These union security provisions mandated that, except in rarely invoked circumstances, every worker hired by an employer with a union contract would be required to maintain membership in the union and pay dues normally by dues "check-off." Failure to pay dues could lead to expulsion from the union and dismissal by the employer. *Id.* at 80. The *quid pro quo* of eliminating strikes in return for union security during World War II was extremely

effective in mitigating industrial conflict and allowed America to vastly increase productivity in support of the War effort.

A similar example of employers using union security clauses to achieve labor peace can be found in the resolution to a bitter 99-day strike in Windsor, Ontario in 1946 by 10,000 United Auto Workers against Ford Motor Company. There, the union sought a closed shop and higher wages as a precondition to ending the strike. *See generally* William Kaplan, *How Justice Rand Devised his Famous Formula and Forever Changed the Landscape of Canadian Labour Law*, 62 Univ. of New Brunswick L.J. 73 (2011). Ivan Rand, a retired Justice with the Supreme Court of Canada, mediated the dispute. He negotiated a settlement which rejected the closed shop but provided that all members of the bargaining unit – whether they were members or not – would be required to contribute funds in the form of union dues to pay the costs of negotiating and administering the collective bargaining agreement. This became known as the "Rand formula" and remains a bedrock of Canadian labor law.

Simply put, employers like *amici* want the freedom to adopt union security clauses when they determine such clauses are appropriate. To deny the bargaining parties that discretion – whether public or private – undermines longstanding labor policy that has promoted stable wages and working conditions for the American worker.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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